Dayang Nurfaizah bte Awang Dowty v Bintang Seni Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S22–1377 OF 2002
MOHD HISHAMUDIN J
30 DECEMBER 2003

Civil Procedure — Injunction — Interlocutory injunction — Entertainers Contract for personal services — Contract not specifically enforceable — Whether injunction should be refused as tantamount to specific performance of a contract for personal services — Specific Relief Act 1950 ss 20(1)(b) & 55

The first defendant applied for an interlocutory injunction against the plaintiff to restrain the plaintiff from appointing or engaging any person, other than the first defendant, as her personal manager and to restrain the plaintiff from making any public performance without the consent of the first defendant.

Held, dismissing the application with costs:

(1) The management agreement was, in essence, a contract to render personal services and thus, by reason of s 20(1)(b) of the Specific Relief Act 1950, which provides that a contract to render personal services is not enforceable, the first defendant could have no action for specific performance of the management agreement against the plaintiff (see para 17).

(2) In deciding whether or not to grant the interlocutory injunction, the court was duty bound to consider whether the first defendant had a cause of action against the plaintiff. For, should the court find that the first defendant had no cause of action against the plaintiff, it must dismiss the interlocutory injunction (see para 17).

(3) As the first defendant, whether in the counterclaim or in the interlocutory application, was seeking to enforce the performance of a contract for personal services, a remedy which is barred by s 20(1)(b) of the Specific Relief Act 1950, she therefore had no cause of action against the plaintiff (see para 19).

[**Bahasa Malaysia summary**

Defendan pertama memohon untuk mendapatkan injunksi interlokutori terhadap plaintif bagi menahan plaintif daripada melantik atau mengambil khidmat mana-mana orang selain defendan pertama sebagai pengurus peribadi beliau dan untuk menahan plaintif daripada membuat sebarang persembahan di khalayak ramai tanpa keizinan defendan pertama.

Diputuskan, menolak permohonan dengan kos:

(1) Pada dasarnya, perjanjian pengurusan berkenaan adalah suatu kontrak untuk memberi khidmat peribadi dan maka itu, oleh sebab s 20(1)(b) Akta Relief Spesifik 1950 yang memperuntukkan bahawa sesuatu kontrak untuk memberi perkhidmatan peribadi tidak boleh dikuatkuasakan,

defendan pertama tidak mempunyai tindakan untuk mendapatkan pelaksanaan spesifik tentang perjanjian pengurusan berkenaan terhadap plaintif (lihat perenggan 17).

(2) Dalam membuat keputusan sama ada hendak memberi injunksi interlokutori atau tidak, mahkamah terikat dengan kewajipan untuk mempertimbangkan sama ada defendan pertama mempunyai kausa tindakan terhadap plaintif. Ini adalah kerana, sekira mahkamah mendapati bahawa defendan pertama tidak mempunyai kausa tindakan terhadap plaintif, mahkamah mestilah menolak permohonan untuk mendapatkan injunksi interlokutori berkenaan (lihat perenggan 17).

(3) Oleh kerana defendan pertama sama ada dalam tuntutan balas atau dalam permohonan interlokutori, telah memohon untuk menguatkuasakan pelaksanaan suatu kontrak untuk perkhidmatan peribadi, suatu remedi yang dihalang oleh s 20(1)(b) Akta Relief Spesifik 1950, maka beliau tidak mempunyai kuasa tindakan terhadap plaintif (lihat perenggan 19).]

Notes

For cases on interlocutory injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2707–2794.
For interlocutory injunctions, see 1 *Halsbury's Laws of Malaysia* (Reissue) para [10.5–027] – [10.5–034].

Cases referred to
Page One Records Ltd & Anor v Britton & Ors [1967] 3 All ER 822 **(refd)**

Legislation referred to
Specific Relief Act 1950 ss 20(1)(b), 55

Wan Rohimy (Ihab bin Yusof with him) (Mior & Mior) for the plaintiff.
Puravelan (M Johnson with him) (Zain Johnson & Assoc) for the defendants.

Mohd Hishamudin J:

[1] By summons in chambers (encl 9), the first defendant, Bintang Seni Sdn Bhd, applies for the following interlocutory remedies, namely:

(a) to restrain the plaintiff, Dayang Nurfaizah, from appointing or engaging any person (other than the first defendant), whether for consideration or not, as her personal manager;

(b) to restrain the plaintiff from making any public performance for any fee, reward or otherwise save and except with the consent of the first defendant.

[2] I have dismissed the application with costs. The following are the brief facts of the case.

[3] The plaintiff is a professional recording artiste involved in the business of singing, performing and recording. On 26 July 1999, she entered

into a contract with the first defendant company ('the management agreement'). By this management agreement, the plaintiff appointed one Ana Muliati Pratadaja, a director of the first and second defendant, as her exclusive personal manager to procure business, to advise and direct the plaintiff's career and to manage the plaintiff's personal affairs. As at the time when the plaintiff signed the agreement she was of young age, her father, Awang Dowty bin Awang Fauzi, also signed the management agreement as her legal guardian.

[4] All three defendant companies are related to one another either through common directorship or through common share ownership and are involved in the same type of business, that of musical recording and the promotion of music and artistes. All three companies are incorporated on the same date, ie 19 May 1997, and they share the same business premises, ie at No 17 Jalan Ipoh, Kuala Lumpur.

[5] By clauses 1.0 and 1.1 of the mnagement areement, it is stipulated that the plaintiff appoints the first defendant as her exclusive personal manager and will engage no other personal manager during the duration of the agreement. The clauses mentioned above read as follows:

> **1.0 Appointment** — The Artist appoints the Manager as her exclusive personal manager throughout the world in all fields related to the arts and entertainment industry. The Manager will offer the Artist advice and counsel and will use her best efforts to advance the Artist's career. The Manager accepts the appointment as set forth here and agrees that in fulfilling the appointment, she will: (1) make herself available to the Artist at reasonable times and places; (2) devote her best efforts to the Artist's affairs; (3) maintain an office and staff adequate to fulfill the appointment and her responsibilities thereunder.
>
> **1.1 Exclusivity** — The Artist appoints the Manager as her exclusive personal manager and will engage no other personal manager during the terms of this agreement The Manager's services to the Artist are non-exclusive; she may manage other artists concurrently and carry on other business activities, at her sole discretion.

[6] By cl 6.6 the plaintiff agreed to refer all offers of employment to her personal manager and that the plaintiff will not accept offers without the consent of her personal manager.

[7] Subsequently, the relationship between the plaintiff and the first defendant turned sour.

[8] In November 2002, the plaintiff filed a suit against the first defendant and the other two companies related to the first defendant. In her statement of claim, the plaintiff seeks a declaration that the management agreement is invalid. The plaintiff alleges that she was lead into signing the Agreement under the undue influence of the said Ana Muliati and her husband, one Tan Boon Heng, who is also the director of the second defendant company as well as a director of the third defendant company. She also seeks a refund of all monies including the sum of RM600,000 which she alleges should have been obtained by her under the terms of the management agreement.

[9] The first defendant in its statement of defence, on the other hand, filed a counterclaim. In the counterclaim, the first defendant alleged that

the plaintiff had breached the management agreement by appointing another person by the name of Liza as her personal manager and by performing at various places on various dates without the permission of her personal manager (Ana Muliati).

[10] In its counterclaim, the first defendant applied for an injunction seeking to enforce the negative covenants contained in cll 1.1 and 6.6 of the management agreement, that is to say, to restrain the plaintiff from appointing anyone else to act as her personal manager and to procure contracts, to restrain the plaintiff from doing performances without the permission of the first defendant and to require the plaintiff to refer all offers to perform shows to the first defendant within 48 hours of the receipt of the offer.

[11] The first defendant relies on s 55 of the Specific Relief Act 1950 ('the SRA'). This provision reads:

> 55 Injunction to perform negative agreement
>
> Notwithstanding section 54(f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative covenant.

[12] Subsequent to the filing of the counterclaim, the first defendant filed, vide encl 9, an application for an interlocutory injunction on terms as already set out above.

[13] In opposing the interlocutory application, the plaintiff, on the other hand, contends that the management agreement is a contract for personal services and therefore cannot be enforced by specific performance. The plaintiff cited s 20(1)(b) of the SRA. Section 20(1)(b) states:

> 20 Contracts not specifically enforceable
>
> (1) The following contracts cannot be specifically enforced:
>
> …
>
> (b) a contract which runs into such minute or numerous details, or which is so dependant on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of is material terms.
>
> *A* contracts to render personal service to *B*;
>
> *A* contract to employ *B* on personal service;
>
> *A*, an author, contracts with *B*, a publisher, to complete a literary work;
>
> *B* cannot enforce performance of these contracts.

[14] Dato' Seri Visu Sinnadurai in his book, *Law of Contract* (3rd Ed) Vol 1 at p 796 explains the rationale for the rule as follows:

> Section 20(l)(b) of the Specific Relief Act 1950 provides that a contract for personal services cannot be specifically enforced: see illustration (a) therein. This is in line with the position under English law: *Johnson v Shrewsbury and Birmingham Rfy Co* [1853] De GM & G 914; 43 ER 358. There are two reasons generally given for

this rule: first, section 20(1)(b) itself provides 'personal qualifications' are difficult to enforce, as they need constant supervision by the court. Second, it is said that under a contract of service, neither the employer nor the employee should be compelled to be in a relationship which they have opted out of. Sometimes it is said that the reason why specific performance is not granted against an employee is because it 'interferes unduly with his personal liberty'. In *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960 Megarry J observed:

> '... The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slow, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon; for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made.'

[15] The learned counsel for the plaintiff also refers to the English case of *Page One Records, Ltd & Anor v Britton & Ors* [1967] 3 All ER 822 where an agreement more or less similar in nature to the management agreement in the present case was held to be a contract for personal services and, as such, the court refused to grant an interlocutory injunction against a group of musicians known as 'The Troggs' to restrain them from engaging anyone as managers for conducting their affairs relating to their professional careers as entertainers other than the plaintiff, since to do so would, in the courts view, amount to enforcing the performance of the contract.

[16] The learned counsel for the plaintiff submits that the remedies sought, whether in the counterclaim or in the interlocutory application, although set out in the form of an injunction to enforce negative covenants, if granted by the court, would, in effect, be as good as granting an order for specific performance of the contract.

[17] In my judgment, in deciding whether or not to grant the interlocutory application, I am duty bound to consider whether or not the first defendant has a cause of action against the plaintiff. For should this court find that the first defendant has no cause of action against the plaintiff, it must dismiss the interlocutory application. It is important to take into account that the first defendant, in the counterclaim, having alleged breach of contract by the plaintiff, is not seeking damages as a remedy. Instead, it seeks an injunction to enforce the negative covenants contained in cll 1.1 and 6.6 of the management agreement. In deciding as to whether or not to grant the application, I am of the view that it is incumbent upon me to examine the provisions of the management agreement in its totality. Now, having so examined the provisions, in particular, cll 1.0, 1.1 and 6.6, and guided by the decision in *Page One Records,* I am in agreement with learned counsel for the plaintiff that the management agreement is, in essence, a contract to render personal services , and thus by reason of s 20(l)(b) of the SRA, which provides that a contract to render personal services is not enforceable, the

first defendant could have no action for specific performance of the management agreement against the plaintiff.

[18] In the present case, bearing in mind the provisions of the management agreement in its totality, it appears to me that, although on the face of the prayers sought, be it in the counterclaim or in the interlocutory application, the first defendant purports merely to seek to enforce the negative covenants in the management agreement, it is, in effect, indirectly seeking specific performance of the management agreement. For, if the court were to grant either the prayers in the main action or the prayers in the interlocutory application, the plaintiff, being a professional singer and a recording artiste, would not be able to earn her livelihood unless she complies with the order of the court. But she has to earn her livelihood. And in order to earn her livelihood she needs to perform; but to perform well and proper as a professional artiste she needs the services of a personal manager. So, ultimately, to avoid being in contempt of the order of the court, she complies with the order, whether she likes it or not. This means, she continues to employ the services of Ana Muliati, the personal manager appointed by the first defendant, she would not perform without the consent of Ana Muliati and she would refer all offers of employment to Ana Muliati. But if she were to comply with such order of the court (be it the interlocutory order or the order in the counterclaim when ultimately granted), would that in effect be as good as if she performs her obligations under the contract? The answer, to my mind, must be 'Yes'.

[19] In conclusion, I hold that the first defendant, whether in the counterclaim or in the interlocutory application, is seeking to enforce the performance of a contract for personal services, a remedy which s 20(1)(b) of the SRA does not allow. Therefore, the first defendant has no cause of action against the plaintiff. Hence, encl 9 must be dismissed with costs.

Application dismissed with costs.

Reported by Eugene Jayaraj